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Nos. 91-1111, 91-1128, 91-1131, and 91-1146

In the Supreme Court of the United States

OCTOBER TERM, 1992

HARTFORD FIRE INSURANCE CO., ET AL.; MERRETT UNDERWRITING AGENCY MANAGEMENT LTD., ET AL.; WINTERTHUR REINSURANCE CORP. OF AMERICA; AND UNIONAMERICA INSURANCE COMPANY LTD., ET AL., PETITIONERS

v.

STATE OF CALIFORNIA, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether domestic insurance companies forfeited their antitrust immunity under the McCarran-Ferguson Act by allegedly conspiring with foreign reinsurers that are not subject to regulation by the States.

2. Whether petitioners' alleged activities constituted a boycott for purposes of the McCarran-Ferguson Act, 15 U.S.C. 1011-1015.

3. Whether petitioners' alleged activities are exempt from the antitrust laws under the state action doctrine.

4. Whether respondents have antitrust standing.

5. Whether principles of comity require the dismissal of certain claims against the foreign reinsurers.

TABLE OF CONTENTS

	Page
Statement	1
Discussion	2
Conclusion	26

TABLE OF AUTHORITIES

Cases:

Associated General Contractors of California, Inc. v. *California State Council of Carpenters*, 459 U.S. 519 (1983)	18-19, 20
Black v. *Cutter Laboratories*, 351 U.S. 292 (1956)	8
Blue Shield v. *McCready*, 457 U.S. 465 (1982)	20, 21
Broadcast Music, Inc. v. *Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979)	15
Brunswick Corp. v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977)	21
California Retail Liquor Dealers Ass'n v. *Midcal Aluminum, Inc.*, 445 U.S. 97 (1980)	16
Chevron U.S.A. Inc. v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)	8-9
Connecticut General Life Ins. Co. v. *Johnson*, 303 U.S. 77 (1938)	7-8
FTC v. *Indiana Fed'n of Dentists*, 476 U.S. 447 (1986)	15
FTC v. *Ticor Title Ins. Co.*, 112 S. Ct. 2169 (1992)	17, 18
Group Life & Health Ins. Co. v. *Royal Drug Co.*, 440 U.S. 205 (1979)	15
Illinois Brick Co. v. *Illinois*, 431 U.S. 720 (1977)	20
Klor's, Inc. v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959)	12
Midland Bank Plc. v. *Laker Airways Ltd.*, [1986] 2 W.L.R. 707 (C.A.)	24
Northwest Wholesale Stationers, Inc. v. *Pacific Stationery & Printing Co.*, 472 U.S. 284 (1985)	15, 16
Proctor v. *State Farm Mut. Auto. Ins. Co.*, 561 F.2d 262 (D.C. Cir. 1977), vacated, 440 U.S. 942 (1979)	14

Cases—Continued: Page

St. Paul Fire & Marine Ins. Co. v. *Barry*, 438 U.S. 531 (1978) 10, 11, 12, 13, 15
Southern Motor Carriers Rate Conf. v. *United States*, 471 U.S. 48 (1985) 17
Timberlane Lumber Co. v. *Bank of America N.T. & S.A.*, 549 F.2d 597 (9th Cir. 1976) 5, 23
Union Labor Life Ins. Co. v. *Pireno*, 458 U.S. 119 (1982) 8
United States v. *South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944) 11, 13
Virginia Academy of Clinical Psychologists v. *Blue Shield*, 624 F.2d 476 (4th Cir. 1980), cert. denied, 450 U.S. 916 (1981) 14
Workers' Comp. Ins. Antitrust Litig., In re, 867 F.2d 1552 (8th Cir. 1989) 14

Statutes:

Foreign Trade Antitrust Improvements Act of 1982, 15 U.S.C. 6a 4, 24
McCarran-Ferguson Act, 15 U.S.C. 1011 *et seq.*:
15 U.S.C. 1011-1015 4
15 U.S.C. 1012(b) 7, 8, 9
15 U.S.C. 1013(b) 7, 10

Miscellaneous:

American Bar Ass'n, *Report of the Commission to Improve the Liability Insurance System* (1989) 14
Antitrust Div., Dep't of Justice, *The Crisis in Property-Casualty Insurance, in* Tort Policy Working Group, *An Update on the Liability Crisis* (1987) 16
P. Areeda, *Antitrust Analysis* (2d ed. 1974) 13
P. Areeda & H. Hovenkamp, *Antitrust Law* (Supp. 1991) 14, 19-20, 21
90 Cong. Rec. 6528 (1944) 8
91 Cong. Rec. (1945):
p. 1208 11
p. 1442 8
p. 1480 ..... 12, 13

Miscellaneous—Continued: Page

p. 1483 ..... 12, 13
p. 1485 .....
N.Y. State Bar Ass'n, Antitrust Law Sec. Symposium (Jan. 28, 1992) 6
Webster's Third New International Dictionary (1986) 10

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This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

Respondents—19 States and numerous private parties—brought these consolidated actions against several primary insurers, reinsurers, insurance underwriters and brokers, and two insurance associations. Respondents allege that petitioners violated the federal antitrust laws, as well as state laws, by engaging in a conspiracy to coerce other insurance companies to alter the terms on which they sell insurance.

1. a. Commercial general liability (CGL) insurance protects the insured against the risk of liability to third parties for personal injuries or property damage. "Pri-

mary" insurers (including petitioners Hartford Fire Insuance Co., Allstate Insurance Co., Aetna Casualty and Surety Co., and CIGNA Corporation) sell CGL insurance to businesses, nonprofit organizations, and government entities. Pet. App. A13.[1]

"Reinsurers" sell insurance to insurers. ("Retrocessional" insurance is insurance for reinsurers. Pet. App. A13.) Primary insurers purchase reinsurance through a network of specialized insurance brokers and underwriters, many of whom do business through Lloyd's of London. The reinsurers' participation in CGL insurance protects the primary insurance companies against catastrophic losses. In addition, primary insurers that "cede" some of the risks they underwrite to reinsurers are freed from the obligation to maintain large reserves against those risks, and thus are able to sell more insurance. Petitioners include domestic reinsurers, such as General Reinsurance Corp. and Winterthur Reinsurance Corp. of America; foreign reinsurers, including six reinsurers known collectively as the "London Company Market" corporations; and several insurance brokers. Pet. App. A13-A14, A116.

Defendant Insurance Services Office (ISO) is an association of more than 1,400 property and casualty insurers that develops standard forms of insurance policies, collects data, and estimates insurance risks. ISO also presents the standard forms to state insurance officials for approval. CGL insurance is written primarily on standard forms developed by ISO. Defendant Reinsurance Association of America is primarily a lobbying organization. Pet. App. A14.

b. For many years, primary insurers sold CGL insurance primarily on an "occurrence" basis. An "occurrence" policy protects the insured against occurrences of liability during the life of the policy, regardless of when a claim is filed. Occurrence insurance has a "long tail"—*i.e.*,

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[1] Unless otherwise noted, "Pet. App." refers to the Appendix to the Petition for a Writ of Certiorari in No. 91-1146 (the Unionamerica Petition).

claims may be filed against the insurance company long after the policy has expired. Pet. App. A14.

Respondents allege that the defendant primary insurers undertook a campaign to end sales of CGL insurance on an occurrence basis, and to substitute "claims-made" insurance. A "claims-made" policy, as its name suggests, provides protection only against claims that are made during the life of the policy. In addition to substituting "claims-made" CGL insurance for "occurrence" insurance, respondents allege that the defendant primary insurers sought to (1) include in claims-made policies a "retroactive date" provision that cuts off coverage for occurrences prior to the retroactive date, even if a claim is filed during the life of the policy, (2) exclude from CGL coverage "sudden and accidental" pollution coverage, and (3) limit coverage of legal defense costs. Pet. App. A14, A121-A122.

Respondents allege that other primary insurers and ISO did not agree to these changes. Instead, in 1984 ISO issued standard CGL policy forms for both occurrence and claims-made insurance. ISO's claims-made policy did not include a retroactive date provision. In addition, both types of ISO policies covered sudden and accidental pollution damages and legal defense costs. Pet. App. A122.

Respondents allege that the defendant primary insurers, unsatisfied with this state of affairs, took steps to coerce recalcitrant competitors to accept the proposed restrictions on CGL coverage. To achieve their goal, the defendant primary insurers allegedly enlisted the assistance of domestic and foreign reinsurers. The conspirators allegedly agreed that the reinsurers would refuse to reinsure any CGL risks on the disputed ISO forms until ISO (1) eliminated the CGL occurrence form, (2) excluded pollution liability coverage from its CGL forms, (3) added a retroactive date to the claims-made form, and (4) limited coverage of defense costs. Pet. App. A15, A123-A127.

Respondents allege that petitioners' scheme was successful. ISO withdrew the 1984 forms and replaced them with forms that excluded pollution coverage and included

a retroactive date provision. Under continuing pressure from the London reinsurers, ISO later withdrew statistical and actuarial support for CGL occurrence forms. Without ISO's support, respondents allege, primary insurers were no longer able to write occurrence insurance. Pet. App. A15, A126-A133.

In 1985, petitioners successfully urged ISO to develop standardized forms of "excess" and "umbrella" insurance that contained a retroactive date, a pollution exclusion, and limits on defense costs. The effect of these modifications was to ensure that consumers could not obtain the disputed types of insurance coverage by purchasing excess or umbrella insurance. Pet. App. A131-A132, A144-A145.

2. The district court dismissed the complaints. Pet. App. A36-A86. It concluded that the challenged conduct was part of the "business of insurance," and therefore immune from the federal antitrust laws under the McCarran-Ferguson Act, 15 U.S.C. 1011-1015. Pet. App. A47-A49. The court held that petitioners' alleged conduct was not within the "boycott" exception to the McCarran-Ferguson immunity, because respondents had not alleged a refusal to deal on any terms or "conduct which goes beyond the making and implementation of agreements to do business only on terms acceptable to the participant." *Id.* at A58.

The district court also held that petitioners were immune under the state action doctrine to the extent that respondents' allegations concern activities related to the development of standard CGL forms. The court found that the States had authorized collective development of insurance forms and had approved the more restrictive CGL forms favored by petitioners. Pet. App. A59-A63.

The court rejected petitioners' contentions that respondents lacked antitrust standing, and that respondents had not alleged a sufficiently direct impact on United States commerce to satisfy the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA), 15 U.S.C. 6a. Pet. App. A65-A67, A73-A82. Relying on principles of international comity set forth in *Timberlane Lumber Co.* v.

Bank of America, N.T. & S.A., 549 F.2d 597 (9th Cir. 1976), however, the court dismissed three claims directed solely at the London reinsurers (Counts 5, 6, and 8 of the California complaint). The court concluded that application of the federal antitrust laws to those claims would lead to a significant conflict with English law and policy. Pet. App. A69-A82.

Because the district court dismissed all the federal claims, it also dismissed the pendent state law claims. Pet. App. A83.

3. The court of appeals reversed. Pet. App. A1-A35. The court held that petitioners had not demonstrated that they were entitled to immunity under the McCarran-Ferguson Act for two independent reasons. First, because the States have no power to regulate reinsurance contracts entered into in foreign nations, the court concluded that unregulated activities with which the defendants were charged fall outside the scope of the McCarran-Ferguson Act. Pet. App. A22-A24. The court further concluded that the domestic defendants forfeited their McCarran-Ferguson immunity "when they conspired with the foreign defendants." *Id.* at A24.

Second, the court held that petitioners' alleged conduct is within the boycott exception to McCarran-Ferguson immunity. The court emphasized respondents' allegations that the insurers "enlisted the reinsurers to compel capitulation by ISO and the insurers who had refused to go along with the Hartford demands." Pet. App. A26. This, the court held, alleges a McCarran-Ferguson Act boycott. The court rejected the district court's suggestion that the boycott exception applies only to an absolute refusal to deal on any terms. It explained that "[t]he evil of a boycott is not its absolute character but the use of the economic power of a third party to force the boycott victim to agree to the boycott beneficiary's terms." *Id.* at A27.

The court of appeals also reversed the district court's state action ruling. Pet. App. A29-A30. The court explained that the anticompetitive conduct at issue is the alleged boycott, and there is no evidence that any State

authorized or actively supervised the boycott. The court held that the States' approval of the ISO forms was not sufficient to confer state action immunity on the boycott, because "state approval of one activity is not state approval of a related but distinct activity." *Id.* at A29.

The court of appeals agreed with the district court that respondents have antitrust standing against all petitioners and that the FTAIA does not bar any of respondents' claims. Pet. App. A19-A21, A30-A31. But the court of appeals, unlike the district court, concluded that comity was not a bar to respondents' claims against the London reinsurers. *Id.* at A30-A35. In applying the balancing analysis of its *Timberlane* decision, the court of appeals concluded that "[a] single factor points toward abstention: the conflict with a long-established British policy towards * * * the underwriting of insurance." *Id.* at A35. But the court concluded that "[e]very other factor —nationality, likelihood of compliance, the significance of the effects on American commerce, their foreseeability and their purposefulness—points to the appropriateness of exercising jurisdiction." *Ibid.*

DISCUSSION

This is a complex and important case. The parties include 19 States and several major domestic and foreign insurance companies. Petitioners state (H. Pet. 11) that the court of appeals' ruling "is of enormous importance and has disrupted the most basic operations of the insurance industry." Moreover, state officials have publicly recognized the significance both of the litigation generally and of the court of appeals' decision specifically.[2] The court's interlocutory decision does not, however, conflict with any decision of this Court or any other court of appeals. Although we are troubled by the court's

[2] See H. Pet. 10-11 (quoting state officials' comments). See also N.Y. State Bar Ass'n, Antitrust Law Sec. Symposium 109 (Jan. 28, 1992) (remarks of George Sampson, Chief of Antitrust Enforcement, State of New York) ("[I]t is incumbent upon the industry to examine many of the activities that currently go on in the industry and take a very careful look.").

suggestion that a domestic insurance company loses its antitrust immunity under the McCarran-Ferguson Act merely because it acts in concert with foreign reinsurers, that suggestion was part of an alternative holding that did not alter the result. Accordingly, we do not believe that review by this Court is warranted at this time.[3]

1. The McCarran-Ferguson Act exempts petitioners' activities from the federal antitrust laws to the extent that they are part of "the business of insurance," are "regulated by State Law," and are not "any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation." 15 U.S.C. 1012(b), 1013(b). The petitioners in No. 91-1111 (the Hartford petitioners) contend (H. Pet. 14-18) that the court of appeals erred in holding that they are not entitled to antitrust immunity under the McCarran-Ferguson Act because they allegedly conspired with foreign reinsurers that are not generally subject to regulation by the States.[4]

We disagree with the court of appeals' suggestion that domestic insurers whose activities would otherwise be immune under the McCarran-Ferguson Act automatically forfeit that immunity merely because they participate in those activities with foreign reinsurers that are generally not subject to state regulation.[5] As the Hartford peti-

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[3] Although we believe that the court of appeals reached the correct result, we intend no criticism of the district court's efforts to require the parties to focus their contentions and resolve as many legal and factual issues as possible without trial. Indeed, the government strongly endorses judicial management techniques of the sort that we understand were employed in this case to streamline antitrust litigation. Moreover, we do not view the court of appeals' decision as precluding the possibility that the case can be resolved on remand on motion for summary judgment.

[4] The petitioner in No. 91-1131, Winterthur Reinsurance Corp., raises each of the questions presented by the Hartford petitioners, and incorporates by reference the Hartford petitioners' arguments. W. Pet. 24.

[5] As the court of appeals observed (Pet. App. A22-A23), this Court has held that a State may not regulate reinsurers where no act in the course of formation, performance, or discharge of the reinsurance contract takes place within the State. See *Connecticut*

tioners correctly note (H. Pet. 15), McCarran-Ferguson immunity applies to "the business of insurance to the extent that such business is * * * regulated by State Law." 15 U.S.C. 1012(b). The statutory language focuses not on the nature of the "entity" at issue, but on the nature of the activity at issue—whether it is "the business of insurance"—and whether that activity is regulated by state law. Consequently, contrary to the court of appeals' conclusion, the mere fact that an "exempt entity" (*i.e.*, a domestic insurance company) acts in concert with a "nonexempt entit[y]" such as a foreign reinsurer does not automatically cause the exempt entity to "forfeit[] [its] antitrust exemption." Pet. App. A24.[6]

Despite our disagreement with the court of appeals' analysis in this respect, we do not believe that the court's ruling warrants interlocutory review. For reasons discussed below, we believe that the court of appeals correctly held that respondents have alleged conduct within the boycott exception to antitrust immunity under McCarran-Ferguson. The court's boycott ruling was "an 'independent ground' of decision" for denying McCarran-Ferguson immunity (H. Pet. 9); consequently, reversing the "forfeiture" ruling would not alter the court of appeals' decision. See *Black* v. *Cutter Laboratories*, 351 U.S. 292, 297-298 (1956) ("This Court * * * reviews judgments, not statements in opinions."); *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S.

General Life Ins. Co. v. *Johnson*, 303 U.S. 77, 81 (1938). The legislative history of McCarran-Ferguson indicates that Congress understood and accepted that limitation on state regulatory authority. See 91 Cong. Rec. 1442 (1945) (statement of Sen. McCarran).

[6] It is true, as petitioners recognize (H. Pet. 16), that one of the factors that is relevant to determining whether a particular practice is part of the "business of insurance" is whether the practice is "limited to entities within the insurance industry." *Union Labor Life Ins. Co.* v. *Pireno*, 458 U.S. 119, 129 (1982). But respondents do not dispute that reinsurers are entities within the insurance industry, and we agree that reinsurance is "a very essential phase" of the business of insurance. 90 Cong. Rec. 6528 (1944) (statement of Rep. Miller).

837, 842 (1984).[7] In addition, unless the particular activities at issue were "regulated by State Law," they would fail for that reason to qualify for McCarran-Ferguson immunity. 15 U.S.C. 1012(b).

We recognize that primary insurers in the United States traditionally have had close ties with foreign reinsurers. Accordingly, petitioners are concerned about the implications of the court of appeals' reasoning for their day-to-day business activities. This is a legitimate and justifiable concern, but we are not persuaded that the Ninth Circuit's brief and singularly unilluminating discussion of the forfeiture issue warrants interlocutory review. In our view, primary insurers may indeed engage in joint activities with foreign reinsurers without forfeiting McCarran-Ferguson immunity to the extent that (1) the primary insurers are engaged in the business of insurance, and (2) their activities are regulated by the States. The second requirement depends, of course, on the law of each individual State. As to the first requirement, we fully agree with petitioners (and respondents do not appear to disagree) that reinsurance is part of the business of insurance, and that consequently discussions and agreements between primary insurers and reinsurers concerning the terms and conditions of insurance or reinsurance will generally fall within "the business of insurance."

2. a. The Hartford petitioners also contend (H. Pet. 18-25) that the court of appeals erred in ruling that their alleged activities constituted a boycott within the meaning of the McCarran-Ferguson Act. We are unpersuaded.

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[7] The court of appeals concluded (Pet. App. A28-A29) that respondents have not alleged a boycott directed at excess and umbrella insurance. In our view, respondents' complaint may fairly be read as alleging that petitioners' alleged activities in the excess and umbrella market were in aid of the CGL boycott. In any event, the petitioners who deal in excess and umbrella insurance also deal in CGL insurance. Consequently, interlocutory review of the "forfeiture" issue would result, at most, in dismissal of some relatively minor claims against some petitioners.

Notwithstanding petitioners' assertion (H. Pet. 24), the court of appeals did not find "a boycott based on nothing more than collective agreements among insurers and reinsurers as to the coverage risks they would be willing to accept." To the contrary, the court of appeals expressly recognized that McCarran-Ferguson allowed the defendants to "confer and agree on the terms on which insurance would be offered; the immunity in so doing is incontestable." Pet. App. A25. The court concluded, however, that petitioners "are charged with much more." *Ibid.* In particular, the court explained, respondents allege that the primary insurers "enlisted the reinsurers to compel capitulation by ISO and the insurers who had refused to go along with the Hartford demands. * * * [T]he defendants have gone beyond joint action to their own regulation of the terms on which CGL and property insurance will be offered." *Id.* at A26-A27.[8]

In our view, the conduct alleged in the complaint falls within the exception to McCarran-Ferguson immunity for "any * * * act of boycott, coercion, or intimidation."[9] 15 U.S.C. 1013(b). Petitioners correctly note (H. Pet. 18) that this Court has decided only one case concerning the scope of the so-called boycott exception to McCarran-Ferguson. In *St. Paul Fire & Marine Ins. Co.* v. *Barry*, 438 U.S. 531 (1978), the four medical malpractice insurers in Rhode Island agreed that the three competitors of St. Paul would not sell insurance to St. Paul's cus-

[8] Petitioners contend (H. Pet. 24) that the court of appeals misread the complaints, and that "in each instance" respondents' allegations "amount[] to no more than an agreement as to the insurability of risks and the terms and conditions of insurance coverage." Fairly read, however, respondents' complaints adequately allege that petitioners enlisted reinsurers to compel dissenting primary insurers to go along with petitioners' demands—that is, they engaged in private regulation of the terms on which CGL insurance would be offered. In any event, interlocutory review of that fact-bound determination is not warranted.

[9] The word "boycott" derives from the treatment accorded to Charles C. Boycott, an English land agent in Ireland who was ostracized in 1880 for refusing to reduce rents. See *Webster's Third New International Dictionary* 264 (1986).

tomers. The *Barry* boycott was thus unusual because it was aimed directly at consumers rather than at competitors. The Court nevertheless concluded in *Barry* that the boycott provision was also intended to reach efforts by insurance companies to coerce unwilling competitors to adopt particular rules or practices. See 438 U.S. at 541, 549 ("boycott refers to a method of pressuring a party with whom one has a dispute by withholding, or enlisting others to withhold, patronage or services from the target," and includes "regulation by private combinations [or] groups"). The dissenters in *Barry* agreed with the Court on this point. See *id.* at 565 (Stewart, J., dissenting) (boycott exception applies to "attempts by members of the insurance business to force other members to follow the industry's private rules and practices").

The *Barry* Court recognized that a clear example of a boycott was the activity at issue in *United States* v. *South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944). See *Barry*, 438 U.S. at 546-550. *South-Eastern Underwriters* involved, among other things, conduct similar to that alleged here: a group of primary insurers conspired with reinsurers to deny reinsurance to competing primary insurers until they agreed to the conspirators' terms. See 322 U.S. at 535 ("The conspirators * * * employed boycotts together with other types of coercion and intimidation to force non-member insurance companies into the conspiracies * * *. *Companies not members of S.E.U.A. were cut off from the opportunity to reinsure their risks.*") (emphasis added).

The legislative history of the McCarran-Ferguson Act reinforces the conclusion that the activities alleged here fall within the boycott exception. Senator O'Mahoney, one of the Senate conferees and a floor manager of the legislation (91 Cong. Rec. 1208 (1945)), put the matter succinctly: "[A]ny attempt by a small group of insurance companies to enter into an agreement by which they would penalize any person or any business which was attempting to do business in the insurance field in

a way that was disapproved by them would be absolutely prohibited by this provision." *Id.* at 1480. See also *id.* at 1483 (statement of Sen. O'Mahoney) (Sherman Act will continue to prevent private groups from "regulat[ing] in the field of interstate commerce").

b. We disagree with the Hartford petitioners' suggestion (H. Pet. 21-24) that the boycott exception applies only to an "absolute refusal to deal upon any terms." H. Pet. 21. It is true that in *Barry* the Court noted that four medical malpractice insurers were "alleged to have agreed that three of the four would not deal on any terms with the policyholders of the fourth." 438 U.S. at 552. But the Court made that comment in the course of its analysis of the unusual boycott at issue in *Barry*, which was directed at consumers rather than competitors. Indeed, the Court began its discussion by holding that "the term 'boycott' is not limited to concerted activity against insurance companies," and then proceeded to consider whether "the type of private conduct alleged to have taken place in this case, *directed against policyholders*, constitutes a 'boycott.'" *Ibid.* (emphasis added). In addition, the *Barry* Court concluded that Congress intended the term "boycott" in McCarran-Ferguson to be interpreted in light of the definition of that term under the Sherman Act. 438 U.S. at 541. A boycott under the Sherman Act may include a conditional concerted refusal to deal. See *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207, 209, 213 (1959) (some boycotting manufacturers and distributors continued to deal with the target, although not on the same terms as with the target's competitor, who was a part of the conspiracy).

Moreover, McCarran-Ferguson refers not only to boycotts, but also to "any * * * act of * * * coercion or intimidation." The ordinary meaning of "coercion" and "intimidation" is broad enough to encompass efforts to compel the target of the boycott to deal on specified terms. Indeed, those terms connote the use of power to compel the victim to do something—*i.e.*, a conditional refusal to deal. By contrast, if the boycott exception were limited

to absolute refusals to deal, the McCarran-Ferguson Act would immunize virtually any form of coercive activity, as long as the companies engaging in coercive tactics did not seek to drive their competitors completely out of business by refusing to deal with them on any terms. We therefore agree with the court of appeals that petitioners' alleged conduct is within the boycott exception of McCarran-Ferguson.[10]

Petitioners emphasize (H. Pet. 18 n.18) "the uncertain state of the boycott exception." See also *id.* at 22 (asserting that courts and commentators are badly confused over whether boycotts are limited to absolute refusals to deal). We agree that *Barry* did not resolve all questions in this area, and that it is by no means always self-evident whether a particular set of facts constitutes a "boycott." See *Barry*, 438 U.S. at 543 ("boycotts are not a unitary phenomenon") (quoting P. Areeda, *Antitrust Analysis* 381 (2d ed. 1974)). But, while uncertainties remain in this area of law, *Barry* did establish some basic lines of demarcation. As the court of appeals recognized (Pet. App. A25), an agreement among insurers "on the terms on which insurance would be offered," without more, is not a McCarran-Ferguson boycott. Moreover, such an agreement does not become a non-immune boycott merely because it has some effect on other insurers. But an otherwise lawful agreement becomes a non-immune boycott if it has the purpose and effect of "pressuring a party with whom one has a dispute by withholding, or enlisting others to withhold, patronage or services from the target," and amounts to "regulation by private combinations [or] groups." *Barry*, 438 U.S. at 541, 549. As leading commentators have recognized, "'a [concerted] refusal to

[10] The legislative history provides further evidence that Congress intended to outlaw efforts of private groups to impose their preferences on their competitors, without limitation as to the particular form such private regulation takes. See, *e.g.*, 91 Cong. Rec. 1480, 1483, 1485 (1945). Indeed, the conduct at issue in *South-Eastern Underwriters*, which petitioners themselves regard as the paradigm of a boycott outlawed by McCarran-Ferguson (H. Pet. 22), involved a conditional refusal to deal. 322 U.S. at 535, 562.

deal except [on specified terms], without more' is exempt." but such a refusal becomes "a nonexempt boycott as soon as the cartel members attempt[] to coerce recalcitrant members." P. Areeda & H. Hovenkamp, *Antitrust Law* 123 (Supp. 1991) (quoting *In re Workers' Comp. Ins. Antitrust Litig.*, 867 F.2d 1552, 1561 (8th Cir. 1989)).[11]

c. Petitioners' alleged conduct may pass muster under the antitrust laws even if it is not immune under

[11] Although petitioners assert that there is "pervasive disarray" in the lower courts over whether the boycott exception includes conditional refusals to deal, petitioners cite only two court of appeals decisions. Upon careful analysis, those decisions are not, we believe, in conflict. In *Virginia Academy of Clinical Psychologists* v. *Blue Shield*, 624 F.2d 476, 484 (4th Cir. 1980), cert. denied, 450 U.S. 916 (1981), the court stated that an allegation of boycott "does [not] necessarily fail because the concerted refusal to deal is conditional, rather than absolute." In *In re Workers Comp. Ins. Antitrust Litig.*, 867 F.2d 1552 (8th Cir. 1989), the court held that an agreement to expel recalcitrant insurers from a rating bureau was a McCarran-Ferguson boycott. There was no "absolute refusal to deal" in the *Workers Compensation* case because insurers were permitted to retain their membership in the rating bureau as long as they adhered to fixed rates and other conditions set by the conspiring insurers. The ABA report quoted by the petitioners (H. Pet. 22) cites not one case to support its assertion that "[m]ost cases require a refusal to deal on any terms." American Bar Ass'n, *Report of the Commission to Improve the Liability Insurance System* 54 n.10 (1989).

The confusion that petitioners discern arises because "[l]ogically speaking, a simple agreement among insurance companies to charge certain premium rates could be viewed as a boycott agreement, since its observance would result in a collective refusal to deal with policyholders except at a fixed price." *Proctor* v. *State Farm Mut. Auto. Ins. Co.*, 561 F.2d 262, 274 (D.C. Cir. 1977), vacated, 440 U.S. 942 (1979). For example, the quoted statement in the ABA report occurs in a footnote to the statement that "cooperative efforts to standardize policy forms have been thought to be included well within the McCarran-Ferguson exemption." *ABA Report* at 54. Although petitioners are correct that the boycott exception does not include every agreement that could be viewed as a conditional refusal to deal, it does not follow that *no* conditional refusal to deal is a McCarran-Ferguson boycott. See *Proctor*, 561 F.2d at 276 n.23 (rejecting suggestion "that a total refusal to deal is necessary").

McCarran-Ferguson. "It is axiomatic that conduct which is not exempt from the antitrust laws may nevertheless be perfectly legal." *Group Life & Health Ins. Co.* v. *Royal Drug Co.*, 440 U.S. 205, 210 n.5 (1979). In particular, the Court has noted that "boycotts are not a unitary phenomenon," *St. Paul Fire & Marine Ins. Co.* v. *Barry*, 438 U.S. at 543, and has carefully distinguished the breadth of the boycott exception to McCarran-Ferguson from the question "whether the conduct in question * * * is *per se* unreasonable." *Id.* at 542. The Court has firmly insisted that the latter category of group boycotts "is not to be expanded indiscriminately" and has generally limited application of the per se rule to "cases in which firms with market power boycott suppliers or customers in order to discourage them from doing business with a competitor." See *FTC* v. *Indiana Fed'n of Dentists*, 476 U.S. 447, 458 (1986). See also *Northwest Wholesale Stationers, Inc.* v. *Pacific Stationery & Printing Co.*, 472 U.S. 284, 293-295 (1985) (detailing characteristics relevant to determining whether a concerted refusal to deal merits per se treatment). "[W]here the economic impact of certain practices is not immediately obvious," the Court has applied the rule of reason rather than a per se analysis. *Indiana Fed'n of Dentists*, 476 U.S. at 458-459 (citing *Broadcast Music, Inc.* v. *Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979)).

In this case, the complaints allege a concerted refusal to deal by reinsurers at the behest of a group of primary insurers. In our view, that is a claim within the exception to the McCarran-Ferguson Act for "boycott, coercion, or intimidation." There is thus no antitrust exemption for the alleged conduct, and the question whether petitioners' alleged conduct was lawful therefore must be analyzed under the antitrust laws. Although we express no view on the merits and have no firm basis for doing

so,[12] we note that further development of the facts may reveal that petitioners' alleged activities are subject to analysis under the rule of reason rather than the per se rule. For example, the decisions of this Court do not necessarily require per se condemnation if the challenged agreement called for the reinsurers to deal with all primary insurers on equal terms. The defendants would have an opportunity to make "plausible arguments that [the challenged practices] * * * were intended to enhance overall efficiency and make markets more competitive." *Northwest Stationers*, 472 U.S. at 294. In that case, per se condemnation would be warranted only if it can be shown that the restriction's "likelihood of anticompetitive effects is clear and the possibility of countervailing procompetitive effects is remote." *Ibid.*

3. The Hartford petitioners contend (H. Pet. 26-30) that their alleged activities are exempt from the federal antitrust laws under the state action doctrine, because several States approved the revised ISO standard forms. That contention does not merit review.

The court of appeals applied the correct legal standard: in order for private anticompetitive conduct to be exempt from the antitrust laws under the state action doctrine, the activity must take place pursuant to clearly articulated state policy, and must be actively supervised by the State. Pet. App. A29. See *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980). In addition, the court of appeals did not disagree with petitioners' contention that the States authorized and actively supervised the collective develop-

[12] In 1987, the Antitrust Division concluded that the primary cause of the crisis in property-casualty insurance was "unanticipated changes in the manner in which tort liability has been established and damages assessed." Antitrust Div., Dep't of Justice, *The Crisis in Property-Casualty Insurance, in* Tort Policy Working Group, *An Update on the Liability Crisis* App. 1 (1987). We are not aware of any reason to alter that conclusion. At the same time, our general assessment of the central cause of the insurance crisis does not, of course, rule out the possibility of specific instances of collusion.

ment of insurance forms, and that consequently that activity is shielded by the state action doctrine. Pet. App. A29.

The court of appeals concluded, however, that the activity challenged by respondents was separate conduct not authorized or supervised by the States: namely, a reinsurance boycott to coerce dissenting primary insurers to accept more restrictive terms and conditions of insurance. Pet. App. A29. The court held that dismissal on state action grounds was not appropriate, because "state approval of one activity is not state approval of a related but distinct activity. * * * The alleged anticompetitive conduct in the present case * * * was neither a reasonable nor necessary consequence of the conduct regulated and approved by the state." *Id.* at A29-A30.

Petitioners do not challenge the principle that "state approval of one activity is not state approval of a related but distinct activity." Pet. App. A29. Instead, petitioners disagree with the court of appeals' determination that "there are truly two distinct activities at issue." H. Pet. 28. That fact-bound dispute does not warrant interlocutory review by this Court. In any event, the court of appeals' ruling on the state action issue appears to be correct. While state officials may have been aware that reinsurers favored the revised ISO forms (H. Pet. 29 n.22), petitioners do not assert that the state insurance officials knew about—let alone approved or actively supervised—the alleged reinsurance boycott that coerced dissenting primary insurers and the ISO to alter the forms. See *FTC* v. *Ticor Title Ins. Co.*, 112 S. Ct. 2169, 2178-2179 (1992). Indeed, it is highly unlikely that state officials approved or supervised such activity, because the state insurance laws expressly prohibit coercion and boycotts. See H. Pet. 27 n.21.[13]

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[13] Petitioners correctly note (H. Pet. 27) that the state action doctrine does not require a State specifically to authorize every action that private parties might take to effectuate a state policy. See *Southern Motor Carriers Rate Conf.* v. *United States*, 471 U.S. 48, 65-65 (1985). But that principle does not imply that state approval of revised insurance forms necessarily constitutes au-

There is no merit to petitioners' assertion (H. Pet. 26) that principles of federalism require the dismissal of respondents' action. Although state regulators may "have the tools they need to deal with any alleged misconduct" (H. Pet. 27 n.21), Congress has carved out an express exception to the McCarran-Ferguson immunity for boycotts. Consequently, the attorneys general of 19 States did not misconstrue principles of federalism by bringing these consolidated antitrust actions. Cf. *Ticor Title Ins. Co.*, 112 S. Ct. at 2178.[14]

4. a. Both the court of appeals and the district court held that respondents have antitrust standing to pursue their claims against all the petitioners. Pet. App. A19-A21, A65-A69. In No. 91-1131, petitioner Winterthur Reinsurance Corp. contends that respondents lack antitrust standing to pursue claims against reinsurers.[15]

Winterthur contends (W. Pet. 11-17) that the Court should grant review to determine whether a plaintiff must satisfy all the factors discussed in *Associated Gen-*

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thorization and active supervision of a boycott that is illegal under state law.

[14] There is no reason to vacate the judgment of the court of appeals and remand for further consideration in light of *Ticor*. The question in *Ticor* was whether the "active supervision" component of the state action doctrine requires that state officials actually determine whether the particular private anticompetitive activity at issue meets the State's regulatory criteria. In this case, the court of appeals did not question petitioners' contention that the States supervised and approved the standardized forms, but instead held that "state approval of one activity is not state approval of a related but distinct activity"—*i.e.*, the conspiracy to coerce reluctant competitors to accede to petitioners' proposed terms. H. Pet. App. 26a.

[15] As an initial matter, it is not clear that Winterthur preserved this argument before the court of appeals. Winterthur states (W. Pet. 2) that it is "a domestic reinsurance company." In addressing standing, the court of appeals noted (W. Pet. App. A19) that only the "foreign reinsurer defendants press[ed] their position on this appeal." Although Winterthur contends (W. Pet. 5 n.4) that it preserved the issue in a footnote in petitioners' brief in the court of appeals, the issue was not discussed in the text of the brief or included in the list of questions presented to the court of appeals.

eral Contractors of California, Inc. v. *California State Council of Carpenters*, 459 U.S. 519 (1983), in order to have antitrust standing, and if not, what weight is to be given to each separate factor in the standing analysis. But this case presents no opportunity to consider those general questions, because the court of appeals appears to have concluded that each of the *Associated General Contractors* factors favored standing. See W. Pet. App. 15a-17a.[16]

Winterthur objects (W. Pet. 18-24) to the court of appeals' application of the *Associated General Contractors* factors to the facts of this case. In particular, Winterthur contends that respondents' injuries were not sufficiently direct to confer antitrust standing because Winterthur is a reinsurer that deals only with other insurance companies, while respondents are consumers who deal only with primary insurers. W. Pet. 19-20. But Winterthur is alleged to have conspired with primary insurers to restrict the availability of *primary* insurance to respondents. See Pet. App. A134-A135, A137-A139; California Compl. Counts 1, 3, 4. Respondents are thus consumers in the very market that the alleged boycott was intended to disrupt; they suffered directly from a reduced range of services in the market in which the alleged restraint occurred. That injury was sufficiently direct to confer antitrust standing. See generally P.

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[16] The court stated (W. Pet. App. 16a) that "almost all of the *Associated General Contractors* factors point to the presence of standing." Although that statement, standing alone, suggests that the court found at least one factor that weighed against standing, a reading of the court's entire opinion suggests that the court was referring to its findings (W. Pet. App. 15a-16a) that "[i]n the claims in which the reinsurers alone are defendants, there will be a problem of allocating the damages caused by the reinsurers as distinct from the damages caused by the primary insurers," and "a danger of duplicative recovery." The court went on to conclude, however, that "the net balance as to damages is in favor of standing." *Id.* at 16a. And the court concluded that each of the other *Associated General Contractors* factors favors standing. W. Pet. App. 15a-17a.

Areeda & H. Hovenkamp, *Antitrust Law* 365-366, 392 (Supp. 1991).[17]

Respondents' position is similar to that of Carol McCready in *Blue Shield* v. *McCready*, 457 U.S. 465 (1982). In *McCready*, an insurer allegedly conspired with psychiatrists to deny insurance reimbursement to subscribers who received psychotherapy from psychologists. The direct targets of the boycott were the psychiatrists' competitors, the psychologists. But the Court held that consumers of insurance such as McCready had standing to sue under the antitrust laws. Just as the boycott in *McCready* made the services of psychologists (and health insurance to pay for those services) unavailable to consumers, so the alleged reinsurance boycott in this case made desired forms of insurance unavailable to consumers such as the plaintiffs. See 457 U.S. at 478-480.

Winterthur observes (W. Pet. 20-21) that if the reinsurers had engaged in a price-fixing conspiracy, the indirect purchaser rule of *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977), would bar respondents' claims, and argues that the Court should extend the indirect purchaser rule to the victims of boycotts. *Illinois Brick*, however, concerned alleged horizontal price-fixing one step removed in the distribution chain from the consumer plaintiffs. In contrast, the antitrust violation alleged in this case is a two-level conspiracy to affect the terms on which primary insurers will sell insurance to consumers. For antitrust standing purposes, it is therefore more closely analogous to resale price maintenance than to horizontal

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[17] Winterthur argues (W. Pet. 20-21) that respondents have not alleged an antitrust injury. No other petitioner raises that argument, and it merits no further review. Respondents allege that Winterthur conspired with primary insurers to engage in a reinsurance boycott that had the purpose and effect of limiting the types of primary insurance that are available to respondents. Respondents have thus alleged an adverse effect on competition of the kind that the antitrust laws are intended to prevent. Winterthur also faults the court of appeals for considering defendants' intent to harm the plaintiffs. See W. Pet. 18-19. But the Court has recognized that intent is relevant to the standing inquiry. See *Associated General Contractors*, 459 U.S. at 537 & n.35.

price-fixing. As leading commentators have recognized, *Illinois Brick* has little application in such cases. "Although the [reinsurer] did not sell directly to the consumer, [it] is a fellow conspirator with the direct-selling [primary insurer] and therefore jointly and severally liable * * * for the consumer's injury." P. Areeda & H. Hovenkamp, *supra*, ¶ 337.2e, at 404.

Moreover, the Court concluded in *McCready* that the problems of duplicative recovery and apportionment of damages at issue in *Illinois Brick* did not arise in the context of the *McCready* boycott. 457 U.S. at 474-475. This case, like *McCready*, does not appear to present a "risk of duplicative recovery engendered by allowing every person along a chain of distribution to claim damages arising from a single transaction that violated the antitrust laws." *Ibid.* Respondents' alleged injury consists of incurring costs not covered by insurance, or paying excessive amounts to obtain insurance coverage. Although the coerced primary insurers might also bring an antitrust suit, they presumably would allege a different type of injury, namely decreased sales of primary insurance as a result of the reinsurance boycott.

b. In No. 91-1146, a group of London reinsurers (the Unionamerica petitioners) contends that respondents lack antitrust standing to pursue certain claims directed solely against foreign reinsurers and unnamed co-conspirators. The Unionamerica petitioners argue (U. Pet. 10-15) that the court of appeals erred by treating antitrust injury as an element of the antitrust standing inquiry. As a result, petitioners contend (U. Pet. 10), "the Ninth Circuit has created a balancing test that permits a plaintiff showing antitrust injury to sue without establishing directness—and, conversely, a directly injured plaintiff to sue without establishing antitrust injury." But petitioners do not contend that respondents have failed to allege an "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977). See U. Pet. 14 (petitioners' standing "motion did not raise the *Brunswick* antitrust injury

issue"). Moreover, the court of appeals expressly found that "[t]he injury alleged was direct." Pet. App. A20. Consequently, the court of appeals would not have reached a different result if it had considered antitrust injury separately from antitrust standing.[18]

The Unionamerica petitioners also contend (U. Pet. 15-21) that the disputed counts of the complaints do not allege a sufficiently direct antitrust injury to confer antitrust standing. According to petitioners, the disputed counts allege only an agreement among foreign reinsurers, and respondents did not buy anything from the foreign reinsurers. In fact, the disputed counts of the complaints allege an agreement not only among foreign reinsurers, but also including "unnamed co-conspirators." Pet. App. A141-A147. In addition, the complaints allege an intent to affect the availability of primary insurance to respondents. *Ibid.* Consequently, the Unionamerica petitioners are not in a materially better position than Winterthur to dispute plaintiffs' standing. Nor, in light of *McCready*, is there merit to their version of the argument that the indirect purchaser rule of *Illinois Brick* should be applied mechanically to customers in markets that are the focus of a boycott.

5. The petitioners in No. 91-1128 (the Merrett petitioners) trade in reinsurance on the Lloyds of London market. They contend that principles of comity require the dismissal of some of the counts against them. They do not contend that comity shields them from respondents' allegations that they conspired with primary insurers in the United States to deny reinsurance to other primary insurers who refused to alter the terms of CGL insurance. Pet. App. A135-A140, A186-A190, A195-A196. Instead, the Merrett petitioners contend that comity requires

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[18] Excluding antitrust injury from the antitrust standing inquiry plainly would not have altered the court's views as to the directness of alleged injury. Moreover, although the court accorded "tremendous significance" to the nature of the alleged injury, it also found that other *Associated General Contractors* factors also "point to the presence of standing against all of the defendants." Pet. App. A20, A21. See note 10, *supra*.

the dismissal of three counts in which they are alleged to have conspired with unnamed co-conspirators to deny reinsurance to primary insurers in the United States until those insurers adopted the proposed changes to their primary insurance policies. See California Compl. Counts 5, 6, and 8. Pet. App. A141-A147.

Both the court of appeals and the district court analyzed the comity issue under the balancing test of *Timberlane Lumber Co.* v. *Bank of America, N.T. & S.A.*, 549 F.2d 597 (9th Cir. 1976). The district court concluded that dismissal of the disputed counts was appropriate because "the conflict with English law and policy which would result from the extra-territorial application of the antitrust laws in this case is not outweighed by other factors." Pet. App. A81. The court of appeals reversed the district court because it concluded that "every other factor" except the conflict with British law and policy weighed in favor of jurisdiction. Pet. App. A32-A35.

Although petitioners contend (M. Pet. 12-18) that the courts of appeals have taken a variety of approaches in analyzing questions of comity, they do not contend that another court of appeals applying a different test would have reached a different result in this case. Indeed, petitioners do not object to the Ninth Circuit's *Timberlane* test, which they regard as "the most enlightened application of principles of international law to questions of jurisdiction under U.S. economic legislation." M. Pet. 3. Accordingly, this case does not present the question whether the *Timberlane* test, or some other test, states the appropriate standard for analyzing questions of comity.

Petitioners' principal complaint is that the Ninth Circuit has misapplied its own *Timberlane* test. Even if that were true, it would not ordinarily warrant review by this Court. But in any event, we think that the result the court of appeals reached under *Timberlane* is reasonable. The court recognized that application of the federal antitrust laws in this context is inconsistent with British law and policy, and that "[s]uch a conflict, unless outweighed by other factors, would by itself be reason to

decline exercise of jurisdiction." Pet. App. A32.[19] But the court concluded that the conflict was outweighed by other factors: the substantial and foreseeable adverse effects on the United States, where the defendants do at least half their casualty underwriting; the alleged intent of the defendants to harm commerce in the United States; the fact that several of the petitioners are wholly owned subsidiaries of United States corporations; the fact that, regardless of the ruling on comity, the foreign firms will remain as defendants as to other counts of the complaints; and the ability of a United States court to grant effective relief by awarding damages payable from the defendants' assets in the United States or by issuing an injunction directed only at U.S. defendants. Pet. App. A33-A35. There is no reason for this Court to review that fact-specific analysis by the court of appeals at this juncture.

Finally, petitioners object (M. Pet. 22-24) to the court of appeals' comments concerning the relationship between *Timberlane* and the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA), 15 U.S.C. 6a.[20] The court of appeals stated:

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[19] In its brief as *amicus curiae* submitted in support of the Merrett petitioners, the United Kingdom states (U.K. Br. 9) that "the conflict in this case arises because plaintiffs ask the U.S. courts to place restrictions on the British industry which is operating under the British regulatory and competition regime," and to hold British nationals liable for conduct that does not violate British law. But neither the United Kingdom nor the Merrett petitioners contend that British policy compelled or encouraged the alleged reinsurance boycott, or that petitioners could not have complied with both American and British law. Moreover, British courts have recognized that British subjects who violate American antitrust laws may be subject to the jurisdiction of American courts in certain circumstances. See *Midland Bank Plc.* v. *Laker Airways Ltd.*, [1986] 2 W.L.R. 707 (C.A.).

[20] The FTAIA provides in relevant part that the Sherman Act "shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless * * * such conduct has a direct, substantial, and reasonably foreseeable effect * * * on trade or commerce which is not trade or commerce with foreign nations." 15 U.S.C. 6a.

> We do not believe a *Timberlane* analysis * * * can be unaffected by the statute. If a complaint survives the new bar of 15 U.S.C. § 6a because the conduct has a "direct, substantial, and reasonabl[y] foreseeable effect" on American commerce, it is only in an unusual case that comity will require abstention from the exercise of jurisdiction. But as the legislation does not eliminate comity, a court should look to see if the case before it is one in which comity still has a role to play.

M. Pet. App. A28. Petitioners do not claim that jurisdiction in this case is barred by the FTAIA. Nor do they assert that the court of appeals' comments concerning the FTAIA conflict with any decision of this Court or another court of appeals. In any event, the court's suggestion that the FTAIA may affect the *Timberlane* analysis was dicta, because the court concluded that the *Timberlane* analysis, quite apart from the FTAIA, required it to exercise jurisdiction. Pet. App. A32-A35.[21]

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[21] The court of appeals referred (H. Pet. App. 32a) to "the weight of the *findings* already made under the [FTAIA]" (emphasis added). But that statement referred only to the district court's findings that "the alleged agreement * * * concerned the provision of reinsurance within the United States," and that "the allegations of effects in United States markets are sufficient to preclude a characterization of wholly foreign commerce." H. Pet. App. 27a.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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